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SUPREME COURT OF ARKANSAS

No. 10-159

Opinion Delivered December 9, 2010

SHANE AND MONICA LOONEY
APPELLANTS

VS.

FAYE M. BLAIR AND CHESAPEAKE OPERATING, INC.
APPELLEES

APPEAL FROM THE WHITE COUNTY CIRCUIT COURT,
NO. CV2008-629,
HON. THOMAS MORGAN HUGHES, JUDGE,

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

JIM HANNAH, Chief Justice

Shane and Monica Looney appeal an order of the White County Circuit Court striking their answer to a counterclaim filed by Faye M. Blair. The Looneys argue that the circuit court abused its discretion in granting the motion to strike their answer, asserting that even if their answer was untimely, it was unnecessary because all issues raised in the counterclaim had already been raised in existing pleadings. We affirm in part and reverse and remand in part.

An order striking an answer is appealable to the Arkansas Supreme Court. Ark. R. App. P.—Civ. 2(a)(4). As an appeal required to be heard by this court, our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(a)(8).

Blair served her counterclaim on the Looneys by mail on February 9, 2009. The answer was due on March 4, 2009, but, the Looneys did not file an answer until April 23, 2009. Blair subsequently filed a motion to strike the answer under Arkansas Rule of Civil Procedure 12(f). In response, the Looneys argued that their answer should be deemed timely because they prepared and mailed an answer for filing to the circuit clerk and believed it had been filed on time. However, the Looneys admitted that they failed to follow up with the circuit clerk, "to determine if the filing had been received." They also asserted that because they acted immediately upon learning that the answer had not been filed, the untimely answer should be excused. Finally they alleged that even if the answer had been untimely, the answer was unnecessary because the allegations in the "counterclaim virtually mirrored the allegations in the Complaint." Although Blair moved to strike the answer, she did not move for a default judgment.

Pursuant to Rule 12(f), when a party fails to timely file a responsive pleading, the circuit court "may" strike the pleading. Thus, the circuit court's decision to strike an answer is reviewed under an abuse of discretion standard. *See Webb v. Lambert*, 295 Ark. 438, 439, 748 S.W.2d 658, 659 (1982). "A court commits an abuse of discretion when it improvidently exercises its discretion, for example, when discretion is exercised thoughtlessly and without due consideration." *Poff v. Brown*, 374 Ark. 453, 457, 288 S.W.3d 620, 623 (2008).

In ruling from the bench at the hearing on the motion to strike the answer, the circuit court stated that, "[i]f lawyers do not have to file their Answers in twenty days and can get

by waiting till ten weeks after the time is due, it will have undesirable consequences." The circuit court further noted from the bench that no evidence was offered to show cause why the answer had not been timely filed, such as, a death in the family, an illness, or a heart attack. Having given "due consideration," the court ordered that the answer be stricken.

Blair asked for a written order. In that subsequent written order striking the answer, the circuit court noted its right to exercise discretion in deciding whether to strike the answer, and concluded that "there must be a consequence for failure to follow the rules of civil procedure." The written order also provided that "the allegations of the Plaintiff's Complaint do not rebut nor deny the allegations of Defendant's Counterclaim."

We first consider the issue of whether the allegations of the counterclaim were all rebutted in existing pleadings. The Looneys rely on *Sparks v. Shepherd*, 255 Ark. 969, 972, 504 S.W.2d 716, 718 (1974), where this court stated that "the very issues raised by appellants were already at issue in the first case by virtue of the pleadings then extant, i.e., the counterclaim and reply thereto." The Looneys also rely on *Jetton v. Fawcett*, 264 Ark. 69, 568 S.W.2d 42 (1978), which concerned whether a pleading would introduce a new issue into the case. However, the counterclaim raises new issues. For example, Blair asserts that there was a promise to reimburse her for all costs, that the Looneys had intercepted and interfered with her mail, that they had exercised undue influence, and that the deed should be set aside. We agree with the circuit court's finding that the counterclaim raised new issues that required a responsive pleading. Further, the Looneys fail to offer any proof that the circuit court

exercised its discretion thoughtlessly and without due consideration in striking the untimely answer. To the contrary, the evidence reveals that the circuit court carefully considered all the arguments and evidence offered by the Looneys, and we find no abuse of discretion.

The Looneys argue that Blair waived the right to rely on the requirement of an answer when she failed to timely move for a default judgment. We are offered no cite to authority and no convincing argument on this issue; therefore, we affirm on this point. *See Koch v. Adams*, 2010 Ark. 131, 361 S.W.3d 817.

In addition, we note that the parties referenced and discussed whether excusable neglect exists under Arkansas Rule of Civil Procedure 55. Rule 55 concerns default judgments. There is no default judgment in the present case. The question of whether excusable neglect should preclude entry of a default judgment is premature and will not be considered. *See Patsy Simmons Ltd. P'ship v. Finch*, 2010 Ark. 451, at 10, 370 S.W.3d 257, 263. Likewise, that part of the order finding that the allegations in the counterclaim should be deemed admitted was premature, and the decision on that point is reversed.

Affirmed in part; reversed and remanded in part.